

ORIGINAL

FILED

September 16 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
a Montana limited partnership;)
PLAINS GRAINS INC., a Montana corporation;)
ROBERT E. LASSILA and EARLYNE A.)
LASSILA; KEVIN D. LASSILA and)
STEFFANI J. LASSILA; KERRY ANN)
(LASSILA) FRASER; DARYL E. LASSILA)
and LINDA K. LASSILA; DOROTHY LASSILA;)
DAN LASSILA; NANCY LASSILA)
BIRTWISTLE; CHRISTOPHER LASSILA;)
JOSEPH W. KANTOLA and MYRNA R.)
KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
INC., a Montana corporation; MEADOWLARK)
FARMS, a Montana partnership; JON C.)
KANTOROWICZ and CHARLOTTE)
KANTOROWICZ; JAMES FELDMAN and)
COURTNEY FELDMAN; DAVID P. ROEHM)
and CLAIRE M. ROEHM; DENNIS N. WARD)
and LaLONNIE WARD; JANNY KINION-MAY;)
C LAZY J RANCH; CHARLES BUMGARNER)
and KARLA BUMGARNER; CARL W.)
MEHMKE and MARTHA MEHMKE; WALTER)
MEHMKE and ROBIN MEHMKE; LOUISIANA)
LAND & LIVESTOCK, LLC., a limited liability)
corporation; GWIN FAMILY TRUST,)
U/A DATED SEPTEMBER 20, 1991;)
FORDER LAND & CATTLE CO.; WAYNE W.)
FORDER and DOROTHY FORDER;)
CONN FORDER and JEANINE FORDER;)
ROBERT E. VIHINEN and PENNIE VIHINEN;)
VIOLET VIHINEN; ROBERT E. VIHINEN,)
TRUSTEE OF ELMER VIHINEN TRUST;)
JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
TRUSTEES OF THE JAYBE D. FLOYD LIVING)
TRUST; ROBERT M. COLEMAN and HELEN)
A. COLEMAN; GARY OWEN and KAY OWEN;)
RICHARD W. DOHRMAN and ADELE B.)
DOHRMAN; CHARLES CHRISTENSEN)
and YULIYA CHRISTENSEN; WALKER)
S. SMITH, JR. and TAMMIE LYNNE SMITH;)
MICHAEL E. HOY; JEROME R. THILL; and)

FILED

SEP 16 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

MONTANA ENVIRONMENTAL)
INFORMATION CENTER, a Montana)
nonprofit public benefit corporation,)
)
Appellants,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS OF)
CASCADE COUNTY, the governing body of)
the County of Cascade, acting by and through)
Peggy S. Beltrone, Lance Olson and)
Joe Briggs,)
)
Appellees,)
)
and)
)
SOUTHERN MONTANA ELECTRIC)
GENERATION and TRANSMISSION)
COOPERATIVE, INC.; the ESTATE OF)
DUANE L URQUHART; MARY URQUHART;)
SCOTT URQUHART; and LINDA URQUHART,)
)
Appellees/Cross-Appellants.)

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

**OBJECTION OF APPELLEES/CROSS-APPELLANTS SOUTHERN MONTANA
ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC. AND
URQUHARTS TO NATIONAL TRUST FOR HISTORIC PRESERVATION IN
THE UNITED STATES AND THE MONTANA PRESERVATION ALLIANCES'
MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

APPEARANCES:

Roger Sullivan
John F. Lacey
McGarvey, Heberling, Sullivan
& McGarvey, P.C.
745 South Main
Kalispell, MT 59901
Ph: 406-752-5566
Fax: 406-752-7124
Email: rsullivan@mcgarveylaw.com

Alan F. McCormick
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula, MT 59807-7909
Ph: 406-523-2500
Fax: 406-523-2595
Email: afmccormick@garlington.com

Elizabeth A. Best
Best Law Offices, P.C.
425 3rd Avenue North
P.O. Box 2114
Great Falls, MT 59403
Ph: 406-452-2933
Fax: 406-452-9920
Email: bestlawoffices@qwest.net

Brian Hopkins
Deputy Cascade County Attorney
121 4th Street North
Great Falls, MT 59401
Ph: 406-454-6915
Fax: 406-454-6949
Email: bhopkins@co.cascade.mt.us

Attorneys for Appellants

Gary M. Zadick
Mary K. Jaraczski
Ugrin, Alexander, Zadick & Higgins, PC
P.O. Box 1746
Great Falls, MT 59403-1746
Ph: 406-771-0007
Fax: 406-452-9360
Email: gmz@uazh.com
Email: mkj@uazh.com

*Attorneys for Appellees/Cross-
Appellants SME/Urquharts*

Attorneys for Appellees Cascade County

David K. W. Wilson, Jr.
Brenda Lindlief-Hall
Reynolds, Motl & Sherwood
401 North Last Chance Gulch
Helena, MT 59601
Ph: 406-442-3261
Fax: 406-443-7294
Email: kwilson@rmslaw.net

Attorneys for Amici Curiae

OBJECTION TO REQUEST FOR LEAVE TO FILE AMICI BRIEF

Appelles/Cross-Appellants Southern Montana Electric Generation and Transmission Cooperative, Inc. ("Southern Montana") and the Urquharts object to the Motion for Leave to File *Amici Curiae* briefs, filed by the National Trust for Historic Preservation and the Montana Preservation Alliance, on the following grounds:

1. The Motion is Untimely.

The National Trust for Historic Preservation ("National Trust") and the Montana Preservation Alliance filed its Motion for Leave to File *Amici Curiae* briefs on September 11, 1009, requesting leave to file its brief in support of Appellants Plains Grains, on or before September 28, 2009. The motion is untimely and should therefore be denied.

The relevant chronology of facts shows that the Motion is an improper last minute filing made too late in the proceedings. Plains Grains filed this appeal on June 1, 2009. The briefing schedule was set by order of this Court dated July 17, 2009. On August 17, 2009, Plains Grains filed their principle brief. Southern Montana and the Urquharts filed their combined opening and response brief on September 11, 2009. Appellee Cascade County filed their response brief on September 14, 2009. Thus, it was not until **well after** Plains Grains filed this appeal and their principle brief that the National Trust and the Montana Preservation Alliance requested leave to file an *amici curiae* brief **in support of Plains Grains' appeal**. In addition, the filing deadline proposed by the National Trust and the Montana Preservation Alliance **follows** filing of the opposing parties' principle and response briefs.

"The Court will deny a motion for leave to submit an *Amicus Curiae* brief that is filed after the normal briefing cycle set for the party to be supported, where the *amici*

failed to show the requisite extraordinary cause for leave to file their brief.” 4 Am.Jur.2d *Amicus Curiae* §3. The Supreme Court has “consistently” followed this rule: “This Court has consistently declined to grant motions for leave to appear as *amicus curiae* which are filed late in the proceedings, after the briefs of the parties have been tendered to the Court, absent extraordinary circumstances.” **Mont. Petroleum Tank Release Comp. Bd. v. Fed. Servs. Ins. Co.**, Mont. Sup. Ct. Cause No. DA 06-0837 (Order dated July 18, 2007) **(Tab A)**.

The Motion is untimely because all parties to the litigation (Southern Montana, the Urquharts, Plains Grains and Cascade County) have already filed their principal briefs. Consequently, it would be patently unfair to allow the National Trust and the Montana Preservation Alliance to appear in the briefing process at this late stage.

In addition, in their request and supporting brief, *Amici* have not presented, or even suggested, any reasons that would constitute “extraordinary circumstances.” Clearly, Plains Grains’ counsel has already made a similar argument and is competent to present the issue. (See Plains Grains Brief, at pp. 1, 2, 7, 26, 27). Southern Montana and the Urquharts have already submitted their brief, arguing that the national landmark is a federal issue being reviewed by a federal agency and is not a zoning issue. (See Southern Montana and Urquharts Brief, pp. 38).

The Supreme Court will also recall that Appellant Plains Grains, which supports the Motion, previously moved this Court to expedite the appeal. (See Plains Grains Application for Suspension of Rules, filed August 17, 2009). The untimely Motion supported by Plains Grains is contrary to its request to expedite the appeal.

2. **The Issue which Amici Seek to Support is a Federal Issue and Not an Issue for the County or the State Courts.**

Amicus curiae cannot raise issues not raised by the parties and which were not raised below. ***State ex rel. Bennett v. Bonner***, 123 Mont. 414, 214 P.2d 747 (1950); ***State ex rel. Kvaalen v. Graybill***, 156 Mont. 190, 496 P.2d 1127 (1972). The national landmark issue is a federal issue. It is subject to a federal process which is ongoing. The question of impact on the landmark is now in the jurisdiction of the Army Corp of Engineers. The Corps has devoted substantial time and effort to resolution of the issue, including holding public meetings and taking comment from the public. The movants recognize this is a federal process, as they acknowledge in their Motion. (Motion at ¶ A(3)). Simply stated, *Amici* should not be allowed to confuse and distort the issues by briefing a matter which is superfluous to the appeal.

The proposed plant is not located within the landmark. It is located off the landmark. The Army Corp of Engineers' process is a consultation process which serves to address and minimize issues such as visibility from the landmark. In the area where the plant is being constructed, however, the landmark is on private property, not open to the public. These issues are now properly before the federal agency and are being reviewed in the appropriate federal process.

As this Court, as well as other courts across the country have recognized, "...*amicus curiae* is not a party to the action,-- he has no control over the proceedings,-- he must take the case as he finds it....*amicus* may not raise new issues which have not been raised by the parties and cannot assume the functions of parties nor create, extend or enlarge issues." ***Weber v. Interbel Telephone Cooperative, Inc.***, Mont. Sup. Ct. Cause No. 02-517 (Order dated April 8, 2003) (**Tab B**), citing ***State ex rel.***

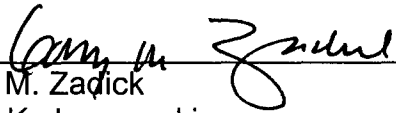
Bennett v. Bonner, (1950), 123 Mont. 414, 421, 214 P.2d 747, 751; ***Mountain States Ins. Co. v. State***, (1985), 218 Mont. 365, 370, 708 P.2d 564, 567; ***Montana Wildlife Federation v. Sager*** (1980), 190 Mont. 247, 265, 620 P.2d 1189, 1200; and ***State ex rel. Dept. of Health & Environmental Sciences v. Lasorte*** (1979), 182 Mont. 267, 596 P.2d 477).

CONCLUSION

For the reasons stated, the Motion should be denied because it is made too late in the briefing process and it raises a matter within the jurisdiction of a federal agency which is actively working toward resolution of the issue.

DATED this 15 day of September, 2009.

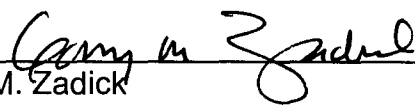
UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: 
Gary M. Zadick
Mary K. Jaraczski
#2 Railroad Square, Ste. B
P.O. Box 1746
Great Falls, MT 59403
Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 15 day of September, 2009.



Gary M. Zadick
Mary K. Jaraczski
Ugrin, Alexander, Zadick & Higgins, P.C.
P.O. Box 1746
Great Falls, MT 59403
Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Roger M. Sullivan
John F. Lacey
McGARVEY, HEBERLING, SULLIVAN & McGARVEY, P.C.
745 South Main
Kalispell, MT 59901

Elizabeth A. Best
BEST LAW OFFICES, P.C.
425 3rd Avenue North
P.O. Box 2114
Great Falls, MT 59403

Alan F. McCormick
GARLINGTON, LOHN & ROBINSON, LLP
199 West Pine
P.O. Box 7909
Missoula, MT 59807-7909

Brian Hopkins
DEPUTY CASCADE COUNTY ATTORNEY
121 4th Street North
Great Falls, MT 59401

David K.W. Wilson, Jr.
Brenda Lindlief-Hall
REYNOLDS, MOTL & SHERWOOD
401 North Last Chance Gulch
Helena, MT 59601

DATED this 15 day of September, 2009.


UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 06-0837

MONTANA PETROLEUM TANK
RELEASE COMPENSATION BOARD,

Plaintiff and Appellant,

v.

FEDERATED SERVICES INSURANCE
COMPANY, MOUNTAIN WEST FARM
BUREAU MUTUAL INSURANCE
COMPANY, NATIONAL FARMER'S
UNION PROPERTY AND CASUALTY
INSURANCE COMPANY, and
MUTUAL SERVICE CASUALTY
INSURANCE COMPANY, A MUTUAL
SERVICE INSURANCE COMPANY,

Defendants and Respondents.

FILED

JUL 18 2007

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

This matter is before us upon the motion of the State Auditor and Commissioner of Insurance John Morrison (hereinafter "the Commissioner") for leave to appear amicus curiae. The Commissioner represents in his motion that he just recently became aware of the pendency of this matter. He asserts his belief that this Court did not fully appreciate the effect of its holding in *Petroleum Tank Release v. Capital Indem.*, 2006 MT 133, 332 Mont. 252, 137 P.3d 522, with respect to the date upon which a statute of limitations for commencement of an indemnity action begins to run, and seeks to argue for reconsideration of this Court's holding in the *Capital Indemnity* case. The Commissioner represents that counsel for Appellant Montana Petroleum Tank Release Compensation Board ("the Board") has no objection to his motion to appear as amicus curiae.

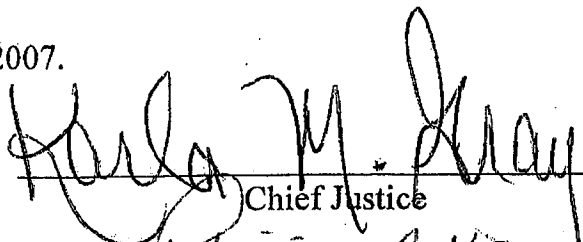
The Respondents have filed a consolidated memorandum in opposition to the Commissioner's motion to appear as amicus curiae, arguing that the State of Montana is already represented in these appeals by virtue of the presence of the Board as a party, and that the Commissioner has not identified an interest in these appeals separate from the interest of the Board. The Respondents further argue that the timing of the Commissioner's motion alone justifies a denial of his request, in light of the fact that they have already filed their consolidated answer brief in this matter, and would be deprived of the opportunity to address the arguments raised by the Commissioner in his amicus curiae brief.

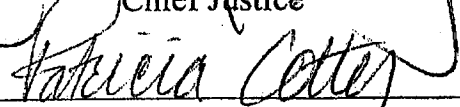
This Court has consistently declined to grant motions for leave to appear as amicus curiae which are filed late in the proceedings, after the briefs of the parties have been tendered to the Court, absent extraordinary circumstances. We conclude that extraordinary circumstances do not exist here, especially in light of the fact that the interests of the State of Montana are already represented by the Board. For this reason, and so as to obviate the necessity of additional briefing on the part of the parties to address the Commissioner's arguments,

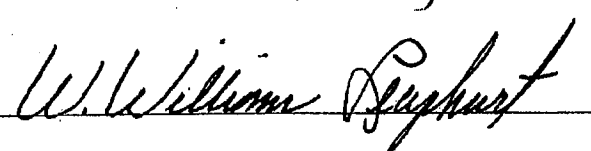
IT IS HEREBY ORDERED that the Commissioner's Motion for Leave to Appear Amicus Curiae herein is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court serve true copies of this Order to all counsel of record, and upon John Morrison as State Auditor and Commissioner of Insurance.

DATED this 18th day of July, 2007.



Chief Justice




Jim Rice
Justices

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 02-517

FILED

APR 08 2003

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

FREDERICK WEBER and MOOSEWEB CORPORATION,

Plaintiffs and Appellants,

v.

INTERBEL TELEPHONE COOPERATIVE, INC.,

Defendant and Respondent.

ORDER

Before the Court is Appellants' (Mooseweb) Motion to Strike Portions of *Amici Curiae* Briefs. Mooseweb argues that *Amici* have included in their briefs new factual material that is not a part of the record on appeal in this case. Specifically, Mooseweb argues that from the *amicus* brief of Mid-Rivers Telephone Cooperative, Inc., we should strike: lines 9-19, page 5; lines 1-2, page 6; lines 3-19, page 13; all of page 14; all of page 15; lines 1-9 and 13-19, page 16; and lines 1-3, page 17. Mooseweb also argues that from the *amicus* brief of 3 Rivers Telephone Cooperative, Inc., et al, we should strike: lines 3-9, page 1; lines 9-14, page 2; lines 8-15, page 3; lines 1-6 and 16-19, page 4; lines 1-5, page 5; and lines 4-6, page 8.

Mooseweb first cites to various cases in which we have held that briefs on appeal are limited to the record on appeal and cannot introduce extraneous or new matters which are not part of the record below. *See, e.g., Frank v. Harding*, 1998 MT 215, ¶ 7, 290 Mont. 448, ¶ 7, 965 P.2d 254, ¶ 7. *Amici* object, arguing that since they are not parties to the case, they

are not bound by the record on appeal, and are, therefore, not bound by the *Frank* line of cases. Amici support their position by citing to case law defining the role of *amici* in court proceedings--as friends of the court--and to cases which condemn a *party's*, rather than *amici*, attempts to supplement the record with facts extraneous to the record.

Since this is an issue of first impression, Mooseweb, with leave of this Court, filed a reply brief. In an appendix to its brief Mooseweb cites nine reported cases¹ which hold *amicus* briefs may not present new evidence or factual materials. Additionally, Mooseweb cites to *State ex rel. Bennett v. Bonner* (1950), 123 Mont. 414, 421, 214 P.2d 747, 751, a case also relied upon by *Amici*, in which this Court stated that while *amicus* may inform the court as to facts or situations that may have escaped consideration or remind the court of a legal matter which has escaped its notice, nonetheless, "[a]n *amicus curiae* is not a party to the action,--he has no control over the proceedings,--he must take the case as he finds it."

Moreover, Mooseweb cites to other Montana cases in which we have stated that *amicus* may not raise new issues which have not been raised by the parties and cannot

¹ The cases cited are: *Bouterie v. Crane* (La. Ct. App. 1992), 604 So.2d 1051, 1052 reversed on other grounds in (La. 1993), 616 So.2d 657; *Gandee v. Glaser* (S.D. Ohio 1992), 785 F. Supp. 684, 686; *Harjo v. Pro-Football, Inc.* (Trademark Trial & App. Bd., 1998), 45 U.S.P.Q. 2d 1789; *High Sierra Hikers Ass'n v. Powell* (N.D. Cal. 2001), 150 F. Supp. 2d 1023, 1045; *Metcalf v. Daley* (9th Cir. 2000), 214 F.3d 1135, 1141, n. 1; *Petition of Oskar Tiedemann & Co.* (3d Cir. 1961), 289 F.2d 237, 240, n. 5; *Stanley v. City of Independence* (Mo. 1999), 995 S.W.2d 485, 488, n. 2; *United States Fidelity & Guaranty Co. v. Victory Land Co.* (La. Ct. App. 1982), 410 So.2d 359, 361; *Wiggins Bros., Inc. v. Department of Energy* (Temp. Emer. Ct. App. 1981), 667 F.2d 77, 83.

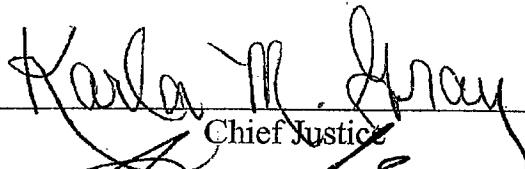
assume the functions of parties nor create, extend or enlarge issues.²

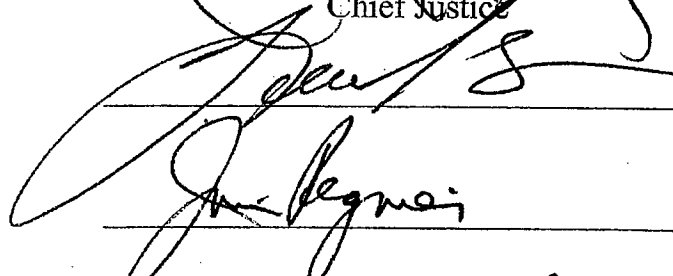
Based on the briefing, we conclude that Mooseweb's position is supported by the law and that the position of *Amici* is not. Therefore,

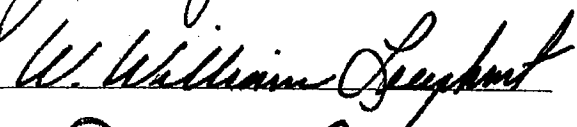
IT IS ORDERED that Mooseweb's motion to strike is GRANTED. The language from the briefs of *Amici* aforementioned is STRICKEN and shall not be argued or considered for any purpose in this appeal.

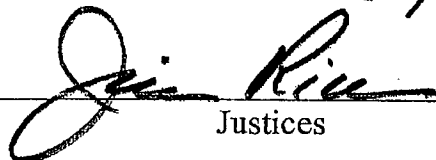
IT IS FURTHER ORDERED that the Clerk of this Court give notice of this order by mail to counsel of record for the parties and *Amici*.

Dated this 8th day of April, 2003.


Chief Justice






Justices

² The cases cited include: *State ex rel. Bennett v. Bonner* (1950), 123 Mont. 414, 421, 214 P.2d 747, 751; *Mountain States Ins. Co. v. State* (1985), 218 Mont. 365, 370, 708 P.2d 564, 567; *Montana Wildlife Fed'n v. Sager* (1980), 190 Mont. 247, 265, 620 P.2d 1189, 1200; and *State ex rel. Dept. of Health & Envtl. Sciences v. Lasorte* (1979), 182 Mont. 267, 596 P.2d 477. See also *Cellnet Communications v. FCC* (6th Cir. 1998), 149 F.3d 429, 443.